

**STATE OF ILLINOIS**  
**ILLINOIS COMMERCE COMMISSION**

LAZ Parking LTD, LLC	)	
	)	
Complainant,	)	
v.	)	
	)	
Commonwealth Edison Company	)	Docket No. 12-0324
	)	
Respondent.	)	

**REPLY OF LAZ PARKING LTD, LLC TO  
RESPONSE OF COMMONWEALTH EDISON COMPANY TO  
FIRST MOTION IN LIMINE**

For its reply (this “Reply”) to the Response (the “Response”) of Commonwealth Edison Company (“ComEd”) to the First Motion in Limine of LAZ Parking LTD, LLC (“LAZ Parking”), LAZ Parking states as follows:

Two ALJ rulings in this proceeding have shown beyond all dispute that ComEd’s arguments against the application of S. Ct. Rule 216 in Commission proceedings represent nothing more than egregious misreadings not only of that rule, but also of Commission Rule 200.360(c), which expressly makes civil discovery devices available to Commission litigants in the same manner as used in the circuit courts. (83 Ill. Adm. Code Section 200.360(c); *see* Exhibits C and D to LAZ Parking’s First Motion in Limine, ALJ Rulings of 2/13/2014 and 3/9/2015.

- I. LAZ Parking Did Not Agree to ComEd’s Proffer of Evidence Contradicting Its Rule 216 Admissions.**  
In its Response to the First Motion in Limine (the “ComEd Response”), ComEd provides

us with yet another massively egregious misstatement of what was agreed to at the November 13, 2015 status hearing. ComEd's counsel takes out of context LAZ Parking's statements at the November 13, 2015 status hearing, which is quoted here at length:

MR. NEILAN:

Okay. Well, I guess the concern that I have -- and it still pops up -- I had filed a motion to strike in connection with their reply.

Given that the motion was denied, I think that I probably look at that as moot and look at the 216 statements that counsel made in their pleadings as arguments of counsel. But we still have **this issue that is recurring throughout where ComEd is continuing to relitigate these 216 issues**, and that needs to be clarified.

So before we get on a schedule of an evidentiary hearing, we need to determine what evidence is of record and how those judicial admissions stack up. **Because it's one thing to present evidence that they think is contrary to the judicial admissions they have of record.**

**It's another to go through as they do in this pleading and say that it's untrustworthy, it was improperly gained. We're going back over the same arguments that ComEd has been making since 2012.**

**We spent three years litigating the application of Rule 216, and this tribunal has held it does apply.** ComEd's still relitigating that issue.

So that needs to be resolved before we go forward.

JUDGE HILLIARD:

Okay. Do you want to respond, Ms. Moran?

MS. MORAN:

I don't think that we're so much relitigating it. What we are doing is telling the Commission how it can apply or reject or how it wants to treat those admissions. And we've got case law in that, and that case law has been put into our pleadings.

JUDGE HILLIARD:

Going forward, though, how can we sort of simplify and expedite? Because it seems to me you're -- there is --

MS. MORAN:

Well, I think the right --

JUDGE HILLIARD:

-- a different approach here as to what those admissions -- what their significance is in the case.

MS. MORAN:

Well, I think I've discussed what the significance is in the case in terms of in our motion for summary judgment. I think that **the Commission should treat them as, if anything, evidentiary admissions** that allows the parties to provide explanations for those.

And it allows the Commission, more importantly, to weigh them like any other evidence.

JUDGE HILLIARD:

All right. Do you have a response to that, Counsel?

MR. NEILAN:

Yes, because I about 1000 percent disagree that ComEd is not trying to relitigate these issues. If you look at their pleadings, they're saying, okay, these were improperly gained, they're untrustworthy, they're unreliable. It offends the integrity of the record, goes against the entire purpose of the ICC's hearing in these matters, and this is exactly the same arguments that they made in their objections to the 216s initially.

They did a motion for reconsideration, which under the ALJ's order, expressly raised absolutely no new arguments, and so it is relitigation.

I have no objection to ComEd. If they want to introduce **other evidence** of the record, that's fine. And the ICC can weigh that. I don't have a problem with that.

What **I do have a problem with is ComEd continuing to**

**attack the integrity of the record because they [i.e., ComEd's Rule 216 admissions] are on the record. And they're not evidentiary admissions, they're judicial admissions. And that's a difference. And that's the law that applies in this case.**

MS. MORAN:

But you're saying that you agree that we are able to put in **additional** records?

MR. NEILAN:

If you want to put in evidence, yeah. I mean, **it doesn't bar you from putting in evidence. But it doesn't contradict the judicial admissions.**

I mean, if you want to -- if the ICC wants to weigh it, yeah. I mean, that's fine. But you keep attacking the process.

JUDGE HILLIARD:

Well, why don't we work on that premise, that you can introduce **additional** evidence regarding the admissions, but the admissions are decided, and they're a matter of record. All right?

MS. MORAN:

Okay.

(Transcript, Status Hearing, 11/13/2015, 196:1 - 201:6, emphasis added). In its Response, ComEd is determined to miss the key concept under discussion at the 11/13/2015 status hearing, namely, that ComEd is free to present additional evidence, but not evidence that contradicts (i.e., once again puts in contention) its Rule 216 admissions. Furthermore, at that hearing LAZ Parking, contrary to ComEd's claim, made clear that ComEd's Rule 216 admissions are **judicial, not evidentiary** admissions.

LAZ Parking has now been litigating ComEd's Rule 216 admissions for almost three and half years. ComEd caused LAZ Parking and the Commission to waste the first two of those years contending with it frivolous argument that, despite the clear and unambiguous language of

Commission Rule 200.360(c), S. Ct. R. 216 had no application to Commission proceedings. (Respondent's Response in Opposition to LAZ Parking's Motion to Deem Certain Facts Admitted, 12/17/2012 (ComEd's "Response to Motion to Deem Admitted"), pgs. 2-4). Despite Commission Rule 200.360(c), despite the Illinois Supreme Court's express inclusion of requests for admission as discovery tools (S. Ct. R. 201(a)), and despite multiple, express Illinois Supreme Court holdings that requests for admission are discovery tools (*Vision Point of Sale v. Haas*, 226 Ill. 2d 334, at 335 (2007); *Bright v. Dicke*, 166 Ill. 2d 204, 208 (1995)), ComEd insisted that requests for admissions are not discovery tools. (ComEd Response to Motion to Deem Admitted, 12/17/2012, pg. 3; Respondent's Reply in Support of its Motion to Reconsider the ALJ Ruling of February 13, 2014).

ComEd argued that the Commission should disregard its Rule 216 admissions because of the ineffective assistance of ComEd's own counsel. (ComEd Response to Motion to Deem Admitted, 12/17/2012, pg. 8 ("LAZ Parking has here injected a "discovery tool" into Commission proceedings i.e., Rule 216, that is ... fraught with peril to the uniformed [*sic*] and inexperienced")).

ComEd even went so far as to claim that the Commission should impose sanctions on LAZ Parking under S. Ct. R. 137 for its use of requests for admissions in this case. (Transcript, Hearing 6/28/2013, 72:12-14; 73:15-19 ("Likewise, Rule 137 sanctions may be available where a requesting party submits requests for admission that are not well-grounded in fact or warranted by existing law and that are interposed for an improper purpose"); 97:1-99:1. As ALJ Benn pointed out in her ruling of February 13, 2014, "The Respondent [ComEd] has not reconciled why the Commission cannot apply Rule 216 while holding a contradictory position that the

Commission should sanction LAZ Parking pursuant to Rule 137. (ALJ Ruling, 2/13/2014, at pg. 3).

LAZ Parking has had to contend with such incoherent ComEd nonsense for almost 3 ½ years, and its pleadings imprint a mark of indelible ridicule on all of its claims in this case. Now, with its claim that LAZ Parking consented, at a status hearing, to ComEd's placing its Rule 216 admissions in contention after 3 ½ years opposing in written pleadings every attempt by ComEd to do just that, ComEd continues its tradition of absurdity.

The transcript of the November 13, 2015 status hearing shows that LAZ Parking had no objection to ComEd's introduction of additional evidence, but never agreed to the admission of any evidence that contradicted ComEd's Rule 216 admissions, which are judicial, not evidentiary, admissions of record.

**II. ComEd Begg the Question of Whether There Exists Any Distinction Between Accuracy "Inspections" and Accuracy "Tests"**

By arguing that its witness Mr. Rumsey's statements about "inspections" cannot contradict ComEd's Rule 216 admissions because the admissions refer to "tests," ComEd simply assumes what it's trying to prove. Therefore, for it to say that its witness Rumsey's testimony cannot contradict the Rule 216 admissions is nothing more than question-begging.

**III. ComEd Witness Jamison's Testimony and Exhibits Place In Controversy ComEd's Rule 216 Admissions and Therefore Must Be Stricken**

Attached as Exhibit A to this Reply is a copy of As LAZ Parking's Requests for Admission. As LAZ Parking made clear in its First Motion in Limine, the entirety of ComEd witness Jamison's testimony and related exhibits contradicts ComEd's Rule 216 admissions 1.3, 1.4, 1.5 and 1.7. By these admissions, the amount of \$36,625.07 constitutes delivery services charges that accrued prior to the two-year recovery period allowed under 83 Ill. Adm. Code

Section 280.100.

ComEd claims that this is untrue. That is not relevant. This is, in practical effect, the sanction applicable to ComEd for its concerted effort from April through October 2012 to subvert the integrity of the Commission's discovery practice by ignoring LAZ Parking's effort to resolve discovery issues, and for continuing that cavalier attitude toward discovery in its responses to LAZ Parking's request for admissions.

ComEd's goal during most of 2012, in brazen contravention to the Commission's policy to foster factual discovery among parties coming before it, was to obstruct and retard the evidentiary discovery process to the maximum possible extent. ComEd has made continual effusions about LAZ Parking's supposed moral turpitude in availing itself of requests for admission. But ComEd's concerns about the use of requests for admission are due not to any interest in the integrity of the Commission's fact-finding process, but rather to ComEd's utter surprise that some ill consequence of its behavior has fallen on its own head.

It was ComEd's absolute, stonewalled refusal to communicate with LAZ Parking regarding resolution of discovery issues that triggered the use of requests for admissions in the first place. ComEd continues to complain about adverse evidence of which it is sole author.

#### **IV. ComEd's Continued Re-Litigation of Its Rule 216 Admissions is Insupportable**

ComEd has either disconnected from reality or is engaging in yet another palpable hypocrisy: its witnesses impermissibly place its Rule 216 admissions in controversy, and then in its Response ComEd criticizes LAZ Parking for raising Rule 216 issues. This is akin to Lizzie Borden asking for mercy on account of her being an orphan.

LAZ Parking's First Motion in Limine sets forth the grounds for prohibiting ComEd from

re-litigating its Rule 216 admissions, and it will forbear from repeating them here. Rather, it stands by the arguments made in its First Motion in Limine, as well as in earlier motions to strike filed in this proceeding.

In recent email correspondence ComEd declares its synthetic outrage at the description of its continual re-litigation of its Rule 216 admissions as some sort of juridical Tourette's. Yet in Section I.B of its Response, ComEd, once again begins its re-litigation of its Rule 216 admissions. This instance can be multiplied by practically every pleading filed by ComEd in this case. Perhaps ComEd would have been happier with a comparison to *Groundhog Day*<sup>1</sup>, but its willful, continual re-litigation of these issues, which have already been ruled on twice by the ALJ, hardly merit so benign an allusion. Rather, the malignant character of ComEd's continual Rule 216 provocations presents itself incontrovertibly, and well merits LAZ Parking's original characterization its actions.

For the same reasons stated in LAZ Parking's First Motion in Limine, the Commission should strike in its entirety Section I.B of the ComEd Response, which section runs from approximately page 10 through page 15 of the ComEd Response.

**V. The Commission Should Take Administrative Notice of Commission Dockets 11-0033 and 12-0298.**

ComEd has been pleased to introduce in this proceeding, under a request for administrative notice, matters from Docket 11-0033. ComEd having opened that door, LAZ Parking is most happy to accept ComEd's invitation to review the facts of that case, as well as the facts in Docket 12-0298, and to discuss what those cases tell us about ComEd.

---

<sup>1</sup>*Groundhog Day*, Columbia Pictures (1993), in which a weatherman portrayed by actor Bill Murray finds himself living a single day again, and again, and again.



Docket 11-0033 illustrates ComEd's real attitude toward the fact-finding process in Commission proceedings. That case concerned a roughly similar fact pattern involving a backbill that ComEd attributed to meter error. Amcor Flexibles, Inc. ("Amcor"), the customer in that case, disputed the charge. ComEd was in possession of the meter in question because it had removed that meter from Amcor's service location. Amcor and ComEd continued to dispute the backcharge. Lawyers were involved on both sides. When ComEd threatened to shut off Amcor's electricity, Amcor filed an informal complaint with the Commission. The Commission was unable to resolve the dispute informally, and so it closed the informal complaint. On the very next day, while the dispute between ComEd and Amcor was still ongoing, ComEd destroyed the key piece of evidence in the case, the malfunctioning meter. (Ill. C. C. Docket No. 11-0033, Stipulation of Facts filed December 22, 2011). This type of spoliation of evidence undermines the entire adjudicatory process contemplated by the Illinois Public Utilities Act and the Commission's Rules of Practice.

In Docket 12-0298, ComEd violated an order of the Commission to begin installing smart meters on a certain schedule. (Ill. C. C. Docket No. 12-0298, Order on Rehearing, pgs. 25-34.)

ComEd's continual re-litigation in this case of its Rule 216 admissions, its destruction of evidence on the eve of a formal proceeding in Docket 11-0033, and its defiance of a lawful final of this Commission in Docket 12-0298 are all part of a consistent trend: ComEd is a recidivist utility. ComEd evidently considers itself above the law. LAZ Parking summed up ComEd's attitude in the June 28, 2013 oral argument in this case:

The conclusion that LAZ Parking draws is that [ComEd] would have Illinois Supreme Court rules and Illinois discovery rules apply, but only to the extent they don't inconvenience ComEd.

Ill. C. C. Docket 12-0324, Transcript, Oral Argument, June 28, 2013, 42:1-7. ComEd can't be bothered to obey laws and rules that inconvenience it.

**VI. ComEd Witness Rumsey's Legal Opinions and Conclusions Should Be Stricken as Requested in LAZ Parking's First Motion in Limine.**

As this is the day prior to the hearing, LAZ Parking stands by the arguments made in its Motion in Limine with regard to ComEd witness Rumsey's testimony consisting of such legal conclusions and opinions.

ComEd wants to have it both ways: it asks the Commission to allow its lay witness Mr. Rumsey to offer his own legal opinions, conclusions and interpretations from the witness stand, but if such testimony is allowed and LAZ Parking tries to cross examine that witness on these issues, ComEd's counsel will most likely object on grounds that the question calls for its witness to provide a legal conclusion or opinion. That is the ComEd double standard.

Furthermore, any allowance by the Commission of such testimony materially, adversely and unfairly prejudices LAZ Parking because it has scrupulously observed the evidentiary rule against the proffer of legal conclusions and opinions from the witness stand by its expert witness. Allowing that testimony will deprive LAZ Parking of the opportunity to offer testimony to counter the legal conclusions and opinions of ComEd witness Rumsey on matters in the Commission regulations on metering and meter testing.

**VII. Portions of ComEd witness Rumsey's Testimony are Completely Speculative**

With regard to ComEd witness Rumsey's testimony as to what he would "expect to see" regarding LAZ Parking's bill, Rule 602 of the Illinois Rules of Evidence provides as follows:

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

(Ill. R. Evid. Rule 602, Lack of Personal Knowledge). This rule applies to this proceeding under Commission Rule 200.610(b):

This subsection applies to all proceedings except those under the ICTL. In contested cases, and licensing proceedings, **the rules of evidence and privilege applied in civil cases in the circuit courts of the State of Illinois shall be followed.** However, evidence not admissible under such rules may be admitted **if it is of a type commonly relied on by reasonable prudent persons in the conduct of their affairs.** [5 ILCS 100/10-40] Objections must be made at hearing to preserve them on appeal. Evidence may be received orally or in writing.

(Emphasis added.) There is absolutely no foundation for testimony by ComEd witness Rumsey regarding customer billing, and any statements by him regarding billing of LAZ Parking at any time, whether before or after the installation of meter no. 141362866, is pure speculation. Nor can his testimony be otherwise admissible under Commission Rule 200.610(b).

A reasonably prudent person conducting his or her own affairs does not, whether as to a matter of fact or one of opinion, rely on the statement of a person who has no knowledge of the subject in question. Accordingly, any testimony by him regarding billings to LAZ Parking must be stricken.

Dated this 14th day of March, 2016

By : /s/ ***Paul G. Neilan***  
Paul G. Neilan  
Law Offices of Paul G. Neilan, P.C.  
33 North LaSalle Street  
Suite 3400  
Chicago, IL 60602  
312.580.5483 Tel  
312.674.7350 Fax  
pgneilan@energy.law.pro